**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of: | ) | |
| | ) | |
| **Implementation of Pay Telephone** | ) | CC Docket No. 96-128 |
| **Reclassification and Compensation** | ) | |
| **Provisions of the Telecommunications** | ) | |
| **Act of 1996** | ) | |

# COMMENTS OF CORRECTIONS CORPORATION OF AMERICA

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Corrections Corporation of America ("CCA"), by its attorneys, hereby files its Comments on the Petition For Rulemaking or, in the Alternative, Petition to Address Referral Issues In a Pending Rulemaking (the "Petition"), filed by Martha Wright and others (the "Petitioners").[1] The Petitioners seek to substitute their own judgment, through the imposition of a series of FCC mandates, for the judgment of states and local authorities with respect to the security requirements maintained for inmate calling services at privately-administered prisons and correctional facilities, and the charges made for inmate calling services. In these Comments, CCA demonstrates that the Commission should reject the Petitioners' request.

[1] These Comments are being filed in response to a Public Notice released on December 31, 2003, *Petition For Rulemaking Filed Regarding Issues Related To Inmate Calling Services Pleading Cycle Established*, CC Docket No. 96-128, DA 03-427 (the "Public Notice"). In the Public Notice, the Commission called for the filing of comments within 20 days after its publication in the Federal Register, which occurred on January 20, 2004, 69 Fed. Reg. 2967. The Petition is now being considered as an *ex parte* presentation in connection with the Commission's pending *Order on Remand and Notice of Proposed Rulemaking*, CC Docket No. 96-128, 17 FCC Rcd. 3248 (2002) (*"Inmate Payphone Proceeding)*. Pursuant to a Joint Motion For Extension of Time filed on January 26, 2004, the Commission extended the time for filing initial comments on the Petition until March 10, 2004. *Order*, DA 04-268, released February 3, 2004.

## I. Summary.

CCA, one of several private providers of inmate corrections and treatment services, urges the Commission to reject the Petitioners' request that the FCC adopt detailed rules compelling fundamental changes in the provision of inmate calling services. The Petitioners seem to recognize, as they must, that existing FCC rules and policies traditionally have permitted state and local governments to establish the structure, costs and charges for inmate calling services, balancing the goal of making telephone service available to inmates at the same time that they protect the safety of the public and the interests of law enforcement professionals.[2] The Petitioners and their consultant now argue, however, that at the present time technology has advanced to the point where this Commission should enter the field and determine the structure of the network architecture of prison telephone systems and the costs and charges for telephone calls made by inmates from these systems. In so doing, the Petitioners seek to substitute their judgment, and the judgment of the FCC, with respect to the most necessary and desirable manner for correctional authorities to balance their legitimate law enforcement, security and rehabilitative interests.

There is no basis for the FCC to substitute Petitioners' judgment on these issues, and to make the Commission the repository of countless new regulatory requirements regarding the offering of telephone service in county jails, detention centers, federal and state prisons and other varied correctional facilities. The Commission should continue to defer to prison administrators, rather than acquiesce in the Petitioners' attempt to impose a new regulatory regime that would necessitate ongoing Commission oversight of the methods by which a whole

[2] Petition at 3.

host of correctional facilities implement their security and anti-fraud protections and charge for the cost of providing inmate calling services. The Commission should instead leave these issues to corrections experts and the states, which are actively managing their legitimate interests in protecting the public and regulating the costs of this service, and already have begun to implement a number of changes that reflect their appropriate judgments on the balance between the benefits of less costly inmate calling services and the need to conduct legitimate law enforcement activities and protect the communities they serve.

First, the Petitioners' effort to target private correctional facilities that operate prisons for governmental authorities should be rejected because it is irrational and discriminatory, and would unreasonably interfere with the judgment of the states regarding the appropriate allocation of their law enforcement and correctional resources between privately and publicly administered prisons and other detention centers. The inmate calling service practices addressed by Petitioners apply to all prison calling systems, which must comply equally with state requirements for security and cost recovery regardless of whether the are owned and operated by the state or through contract of the state with a private entity like CCA. Imposition of Petitioners' discriminatory restrictions only will serve to distort the government's ability to determine how best to allocate limited correctional resources between privately and publicly managed facilities.

Second, the Commission must not compel prisons and correctional facilities to implement a debit calling payment system for telephone calls made by inmates, but instead should allow the states and the managers of their correctional facilities to decide whether, when and how to implement such a process. Petitioners can cite no statutory authority for the

imposition of such a mandate, and legitimate penological interests will be compromised by requiring all prison facilities to offer pre-paid debit calling. The FCC's adoption of Petitioners' proposed debit calling option will create a commodity that must be administered by the prison and incorporated into the complicated software used to protect law enforcement interests and the public. Prisons would be forced to incur substantial administrative and technical costs, even against their own possible judgments that the commodity would foster abusive behavior in the prisoner population without achieving any measurable cost reduction. On the other hand, correctional facilities have every incentive to implement debit calling without any federal mandate to the extent that the believe such a process will reduce costs and eliminate collection problems without creating unacceptable security risks.

Third, the Commission should reject the Petitioners' proposal that the FCC compel private correctional facilities to establish a "prison telephone system" operated by one carrier that would be obligated to provide access to multiple long distance carriers. The Commission has held squarely that the prison environment entails legitimate law enforcement and security interests that reasonably prevent providing caller preferences for multiple carriers. In seeking FCC rules that will change the fundamental structure of telephone systems in correctional facilities, the Petitioners have ignored the absence of any statutory authority for their proposed requirements, and seek to substitute their own judgment for the essential right of these facilities to manage their own property and security concerns to best protect the public. The Petitioners' request for forced multiple carrier access constitutes a serious intrusion and restraint on the ability of correctional facilities to manage their interest in overall facility security, and is even contrary to Commission precedent concerning multiple tenant environments where less serious countervailing interests are at stake. The Petitioners also have ignored the significant and

varying costs of correctional facilities in providing such service, and have ignored completely the role and function of local intrastate telephone calls in this system.

The Commission therefore must reject the Petitioners' proposal to replace the current inmate calling system with an FCC-mandated set of services and rates. The Petitioners' proposal for a detailed rate-setting in this docket is not only woefully inadequate to deal with the substantial security issues presented by the broad range of jails, prisons, detention centers and other correctional facilities, but poses serious concerns regarding their ability to recover the costs and investment necessary to provide inmate calling services. It is highly doubtful that any system of federal rate regulation could be established and administered that would meet the legitimate needs of the whole range of correctional facilities that provide and oversee inmate calling services, but the adoption of Petitioners' proposal nevertheless would involve the Commission in complex structural and rate regulation for many years to come.

The Petitioners have presumed without any support that if the FCC establishes a new and different regulated market for inmate calling, carriers will come, and this is a risk that correctional facilities and the public cannot assume. Moreover, at the same time correctional facilities assume this risk, the Petitioners propose the summary and wholesale elimination of state-regulated commissions imposed on inmate calls to recover the costs to correctional facilities in providing inmate calling and other services, an action that undoubtedly will have a serious deleterious impact on departments of correction and their ability to continue to provide these services to inmates. The states have a substantial and legitimate interest in the operation of corrections facilities, including the facilities operated pursuant to contracts. The government authorities that are responsible for the provision of correctional services, and their intrastate

operations, are actively addressing inmate calling practices, and charges for these services, including commission-based cost recovery. The Commission should not, as requested by the Petitioners, attempt to substitute their judgment for that of the correctional authorities

## II. The Commission Cannot And Should Not Adopt Different Rules For Privately Administered Jails, Prisons, Detention Centers And Other Correctional Facilities.

Founded in 1983, CCA specializes in the design, building and management of prisons, jails and detention facilities and providing inmate residential and prisoner transportation services in partnership with federal, state and local governments. CCA represents all three federal corrections agencies, almost half of all states, and more than a dozen local municipalities. CCA is authorized by these federal, state and local governments to furnish and operate these correctional facilities as a substitute or compliment to the correctional facilities supplied and managed by these government agencies and their departments of correction. CCA has approximately 65,000 beds in 64 facilities, including both facilities it owns and those facilities under contract for management in 20 states and the District of Columbia. Currently, CCA manages more than 62,000 inmates, including males, females and juveniles at all security levels, and employs more than 15,000 professionals in these efforts nationwide. CCA also offers a variety of rehabilitation and educational programs, including basic education, life skills and employment training, and substance abuse treatment. CCA provides health care in its correctional facilities, including medical, dental and psychiatric services, food services and work and recreational programs. While CCA is a leading provider of correctional and treatment services to states, there are a number of other providers who offer services that compete with CCA in the management of jails, prisons and other corrections facilities.

Pursuant to contractual agreements and the laws of the various jurisdictions in which they operate, CCA and other privately-managed correctional operators are required by governmental authorities to follow various practices for the housing and direction of the inmates incarcerated in these facilities including inmate calling services. While CCA and other corrections facilities are not "common carriers" providing telecommunications services to inmates,[3] CCA and others typically arrange for the provision of telephone service to the inmates of the correctional facilities they manage for federal, state and local governments. The nature of these telecommunications services, including the essential security measures taken to protect the public, law enforcement officials, and the inmates themselves, often are established by contract under the rules of the governmental departments of correction. These rules are adopted pursuant to federal law governing the Federal Bureau of Prisons and the laws of the states, and also govern the charges for services including intrastate rates, which are often regulated by the appropriate state public utilities commission.

The Petitioners selectively have sought to have the Commission make their proposed extensive changes to inmate calling services only at privately-administered prisons.[4] There are, however, no material distinctions between the inmate calling services provided at privately or publicly administered correctional facilities, and the Petitioners cannot provide any rational basis for distinguishing between these facilities, which is evident even from a cursory review of the proposal of the Petitioners' consultant Douglas A. Dawson.[5] The same

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[3] *See Bowers v. T-Netix and Verizon Phone Service and PA Dept. of Corrections,* 837 A.2d 608, 612 (PA 2003) ("Clearly, the Department [of Corrections] is not a telecommunications carrier or a local exchange carrier and the terms of the Telecommunications Act simply do not apply").

[4] *See, e.g.,* Petition at 1, 3, 8.

[5] Dawson indicates that inmate calling practices are generic, and that his analysis applies to all

government authorities, and rules and regulations, apply to the essential features and charging practices for the provision of inmate calling services by both publicly and privately managed prisons. Thus, any potential conflict with state laws regarding these practices would apply equally to privately and publicly administered prisons.

The Commission therefore cannot and should not discriminate between public and private facilities in regulating inmate calling services. Commission adoption of such discriminatory regulations would not only be arbitrary, but disserve the public interest in permitting governmental corrections authorities to best decide on the allocation of their penological and correctional resources. Such authorities generally contract with private administrators of prisons like CCA when they do not have the personnel, physical, or capital resources to house and treat their inmates, or have otherwise decided that the private administration of the correctional facility will better serve penological and treatment goals. The Commission's adoption of different rules and procedures for inmate calling services at privately-administered facilities, including changes to the fundamental technical and cost structure of those facilities, would inject the unnecessary evaluation of those differences into the decisions of correctional authorities. The FCC should avoid such an arbitrary intrusion into the decisions of federal, state and local correction authorities regarding the allocation of their resources, especially where it has, and must, acknowledge that its expertise in penological services is significantly limited.

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prison calling systems. *See* Petition, Attachment A ("Dawson Statement"), ¶ 3.

## III. The Commission Previously Has Dealt Correctly With Petitioners' Assertions, And Should Not Reverse Its Conclusions That Recognize The Limits To Its Appropriate Expertise And Jurisdiction.

The Petitioners attack the Commission's long-established conclusion that exclusive arrangements for the provision of inmate calling service are justified by the need to satisfy legitimate security and other penological goals of the states and their agents that are responsible for housing inmates.[6] The Petition baldly asserts that the Commission's "assumption is incorrect" and that the Commission should "reverse its policy" that has "long condoned these practices, and require [privately- administered prison] facilities to permit competition in the provision of long distance inmate calling services . . . ."[7] This position ignores the thoughtful treatment the Commission consistently has given the legitimate security and anti-fraud concerns of the correctional facilities in various proceedings. The Commission cannot act on these matters without understanding the special circumstances of corrections authorities -- regardless of whether they are administering private or publicly-owned or managed facilities -- that the Commission has recognized keep inmate telephone access from becoming a tool for misuse, harassment, or criminal activity both inside and outside the prison facility. Nothing has changed to alter this paramount concern, and as discussed in these Comments and in the supporting Declaration of Peter K. Bohacek, Ph. D. and Charles J. Kickler, Jr., Attachment A hereto, nothing in the Petition or in the Dawson Affidavit demonstrates that the Commission should reverse its current policies regarding inmate calling services in private or publicly-operated or managed correction facilities.

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[6] Petition at 8.

[7] *Id.* The Petition also calls upon the Commission to force privately-administered corrections facilities to permit pre-paid debit or calling cards in addition to collect call offerings.

### A. Past Commission Proceedings And Inmate Calling Services.

In 1990, in adopting the Telephone Operator Consumer Services Improvement Act,[8] Congress first addressed consumer complaints that call "aggregators" -- operators of telephones made available for general public or transient use -- were preventing or "blocking" pay phone users from accessing the carrier of their choice. Congress adopted various requirements applicable to such aggregators, including requirements to provide for access to the carrier of a user's choice, and required the FCC to conduct a rulemaking to implement these and other protections. The Commission recognized, however, that the statutory definition of telephone call "aggregator," and the obligations of carrier access imposed on them by TOCSIA, should not apply to correctional institutions in situations in which they provide inmate-only phones.[9] The Commission recognized that "the provision of such phones to inmates presents an exceptional set of circumstances that warrants their exclusion from the regulation" adopted to ensure that users of public telephones had choice in their access to carriers.[10] Thus, unlike

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[8] Pub. L. 101-435, 104 Stat. 987, 47 U.S.C. § 226 ("TOCSIA").

[9] *Policies and Rules Concerning Operator Service Providers,* Report and Order, CC Docket No. 90-313, 6 FCC Rcd. 2744, 2749-52 (1991).

[10] *Id.* The Commission recognized that Congress expressly discussed telephones made available "to the general public in hotels, hospitals, universities, airports, and other pay telephones," and noted that aggregators included "hotels and motels, hospitals, universities, airports, gas stations, pay telephone owners, and others," but remained silent with respect to correctional institutions. *See* S.Rep. No. 439, 101st Cong., 2d Sess. at 2, 10. This is in direct contrast to Section 276 of the Act, which expressly included inmate telephones in its direction that the Commission ensure fair compensation to payphone providers for each and every call using their telephones. *See* 47 U.S.C. § 276(d) ("the term 'payphone service' means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.")

telephone users in places such as hotels, hospitals, and airports, the Commission concluded that inmates are not entitled to select the long distance carrier of their choice.[11]

In 1996, the Commission reiterated that it would not consider mandating such access, or "billed party preference" in the prison context for security reasons.[12] The Commission, "persuaded by comments of the United States Attorney General, other federal officials, and nearly all who have commented on this issue," declined to adopt billed party preference or rate caps or price benchmarks.[13] The Commission concluded that with regard "to such calls, it has generally been the practice of prison authorities at both the federal and state levels, including state political subdivisions, to grant an outbound calling monopoly to a single IXC serving the particular prison. This approach appears to recognize the special security requirements applicable to inmate calls."[14]

Subsequently, the Commission reiterated that inmate calling services are not subject to operator-service provider choice. In amending Section 64.710 of its rules, the Commission again mandated oral rate disclosure requirements, but rejected billed party preference and a tariff for inmate calling services.[15] "Recognizing the security needs of prisons,

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[11] *Id. See also Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators,* 11 FCC Rcd. 4532 (1996).

[12] *See Billed Party Preference for InterLATA 0+ Calls,* Second Further Notice of Proposed Rulemaking, CC Docket No. 92-77, 11 FCC Rcd. 7274, 7300-02 (1996).

[13] *Billed Party Preference for InterLATA 0+ Calls,* Second Report and Order and Order on Reconsideration, 13 FCC Rcd 6122, 6156 (1998) (*"BPP Order on Reconsideration"*).

[14] *Id.* Although the Commission refused to adopt carrier access requirements or any form of rate regulation, it did mandate disclosure of rate information. *Id.* at 6157.

[15] 47 C.F.R. § 64.710 (2002).

the Commission does not require them to grant inmates access to multiple OSPs."[16] The Commission confirmed this conclusion several months later, when it recognized the long litany of precautions that must be undertaken by correctional facilities that make inmate calling services "quite different from the public payphone services that non-incarcerated individuals use."[17] The Commission recognized that for security reasons, among other things, the dominant paradigm for inmate calling services must be the use of dedicated, usually on-site, equipment that is separate from network operator service platforms. This paradigm requires the simultaneous implementation and integration of call processing, monitoring, restricting, identifying and tracking functions, and prohibits use of pre-subscribed operator service providers, or any other platforms that might make more possible call reorigination.[18] In summary, the Commission's decisions on a variety of inmate calling service issues reflect one consistent theme: that "legitimate security considerations preclude reliance on competitive choices, and the resulting market forces, to constrain rates for inmate calling."[19] CCA urges the Commission to keep paramount its own findings that security concerns take precedence over fostering competition in the special setting of correctional facilities.

**B. Court Decisions And Inmate Calling Services.**

Although prisoners and others have periodically challenged the basic conclusion that law enforcement and security concerns cannot be compromised in prisons to facilitate

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[16] *Billed Party Preference for InterLATA 0+ Calls,* Second Order on Reconsideration, CC Docket No. 92-77, 16 FCC Rcd. 22314, 22323 n.46 (2001) (citing *BPP Order on Reconsideration* at 6156 (1998)).

[17] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3252 (2002).

[18] *Id.*

specific inmate calling practices and less costly service, courts have repeatedly rejected claims, ranging from unlawful restraint of trade, to deprivation of Constitutional rights, to conspiracy. These court decisions parallel the decisions by the Commission -- and allow experts in corrections to determine the design, features, and rates associated with inmate calling services in various correctional facilities.

For example, the Seventh Circuit Court of Appeals has reviewed claims by a group of Illinois inmates and their families that the exclusive contract between an Illinois prison and an inmate calling services provider that included a fifty percent commission on gross revenues was "exorbitant, being far higher than required to cover the costs involved in providing phone service to inmates."[20] The Seventh Circuit rejected the plaintiffs' claim that the inmate calling rates violated their First Amendment right of free speech, saying that "although the telephone can be used to convey communications that are protected by the First Amendment, that is not its primary use. . . . Not to allow them access to a telephone might be questionable on other grounds, but to suppose that it would infringe the First Amendment would be doctrinaire in the extreme."[21] The Seventh Circuit addressed the plaintiffs' equal protection argument, and held that it was "precisely the kind of claim that is within the primary jurisdiction of the

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[19] *Id.* at 3276.

[20] *Arsberry v. State of Illinois,* 244 F.3d 558, 561 (7th Cir., 2001).

[21] *Id.* at 564-65 (citations omitted). In noting plaintiffs' contention that the high rates are motivated by "pure greed," the court of appeals responded that "greed" did not "seem the right characterization ... considering that prisons are costly to build, maintain, and operate, and that the residents are not charged for their room and board. By what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve." *Id.* at 564. *See also Washington v. Reno,* 35 F.3d 1098, 1160 (6th Cir. 1994) (inmate has no right to unlimited telephone use and telephone access is subject to rational limitations in face of security interests).

telephone regulators."[22] As the Seventh Circuit was well aware, the Commission's precedent discussed above strongly supported the conclusion that prison inmates are not entitled to the same choice of services and competitive costs as the general public.[23]

The United States District Court for the Northern District of California addressed similar complaints from an inmate, including a claim that the inmate calling system violated his equal protection rights because it was limited to collect calls and the rates were high. The court recounted plaintiff's contention that he could not make calls because the recipients would not accept collect calling, and denied his equal protection claim saying "all [inmates] had to use the collect call system. The county jail could properly impose restrictions, such as requiring long distance calls to be collect, to further legitimate security considerations and avoidances of abuse by opportunistic or vacillating defendants."[24] Other district courts have noted that "where prison regulations are the subject of a plaintiff's attack, the Supreme Court has abrogated the use of strict scrutiny in favor of a universally applicable rational basis standard of analysis: provided that such regulations are 'reasonably related to legitimate penological interests,' they will be deemed constitutionally sound."[25] The Ohio district court has followed the equal protection analysis applied by a district court in Kentucky, where, the court dismissed the claims of inmate families saying that while "those raising the equal protection claims are the recipients of inmate

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[22] *Id.* at 565.

[23] The court of appeals rejected the claim that charging a high price for phone calls constituted a taking of plaintiffs' property, finding it "downright absurd." *Id.* at 565.

[24] *Schwerdtfeger v. LaMarque,* 2003 WL 22384765 (N.D. Cal). As the Supreme Court has stated, the judiciary is "ill equipped" to deal with "the difficult and delicate problems of prison management." *Thornburgh v. Abbott,* 490 U.S. 401, 407-08 (1989).

[25] *McGuire v. Ameritech*, 253 F. Supp. 988, 999 (S.D. Ohio 2003) (citing *Turner v. Safely,* 482 U.S. 78, 89 (1987)).

calls, the reason for their different treatment arises from a policy directed at another group, the inmates. . . . Because inmates initiate the calls, the recipients are necessarily constrained by whatever security measures are appropriate to place on the inmates themselves."[26]

Finally, in *Bowers v. T-Netix*, a Pennsylvania district court, in rejecting various claims regarding exclusive inmate calling service contracts, noted its previous determination that "an inmate's right to telephone access is subject to rational limitations in light of the Department's legitimate security concerns. . . . We do not believe, therefore, that an inmate possesses a right to choose a telephone service provider. As we stated in *Feigley,* the lack of competitive alternatives in telephone carriers pursuant to a Department contract and prison administrative policies is an unfortunate, but necessary, incidence of incarceration."[27] Consistent with the previous conclusions of this Commission, federal and state courts have recognized that

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[26] *Daleure v. Kentucky,* 119 F. Supp 2d 683, 690-91 (W.D. Ky. 2000) ("The connection between the inmates and the recipients of their calls cannot be severed. It is the relationship to inmates alone that defines the group. If security precautions affect the telephone services that are available to inmates, this will inevitably impact the inmate call recipients.").

[27] *Bowers v. T-Netix and Verizon Phone Service an PA Dept. of Corrections,* 837 A.2d at 613, citing *Feigley v. Pub. Util. Comm'n*, 794 A.2d 428 (Pa. Cmwlth.), *appeal denied sub nom., C.U.R.E. of Pa. v. Pub. Util. Comm'n,* 569 Pa. 723, 806 A.2d 863 (2002). Finally, in a class action suit similar to that brought by the Petitioners in *Wright*, a federal district court in Michigan granted summary judgment in favor of the State of Michigan where individuals who accepted collect calls from inmates claimed that the exclusive agreements between inmate calling service providers and the State resulted in excessive and discriminatory fees, produced adverse anticompetitive effects, unreasonably restrained trade, and infringed on their right to obtain access to the interstate common carrier of their choice in violation of federal and state law. *Miranda v. State of Michigan,* 168 F. Supp. 2d 685 (2001). Although the court found the plaintiffs had standing to bring the antitrust action, it ruled that because the collect-call-only system arises out of the State's sovereign authority to operate its penal institutions, it is immune from liability under the Sherman Antitrust Act. *Id.* at 691. The court also found that plaintiffs' claims fall within the primary jurisdiction of the Commission, *id.* at 693, and this Commission has consistently held that the legitimate law enforcement and security interests of the correctional facilities justified limits on calling service choice in penal institutions.

the special security and other concerns of correctional facilities necessarily limit the service offerings for inmate calling, and increase the charges for such service.

## IV. The Commission Should Not Mandate That Inmates Have Access To Debit Cards.

Petitioners now seek an FCC prohibition on "collect-call only restrictions" in all correctional facilities, essentially asking the FCC to mandate that all privately-managed correctional facilities offer inmates debit cards or pre-paid debit account calling services as an alternative to collect calling services.[28] The Petitioners rely heavily on the testimony of their consultant, Douglas A. Dawson, who attempts to explain why pre-paid debit calling systems should be imposed on correctional facilities, discounting the security concerns and administrative burdens associated with implementing any debit calling systems.[29] Dawson argues that pre-paid debit calling processes should even be favored by correctional institutions, given the likely reduction in uncollectible accounts and allegedly minimal costs of administering debit calling.[30] The Petitioners and Dawson thus paternalistically maintain that, regardless of the burdens of administering such a program or the concern that various correctional facilities might have regarding the effect of implementing and managing a debit calling program on the safety of their inmate population, all correctional facilities should be forced to implement a pre-paid debit calling system.

The Commission must not compel prisons and correctional facilities to implement a pre-paid debit calling system. As an initial matter, there is no authority in Section 201, Section

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[28] *See, e.g,* Petition at 8.

[29] *See* Dawson Statement, ¶¶ 30-37. Dawson acknowledges that pre-paid debit products already exist at a number of federal and state facilities, including some privately-administered facilities at which Evercom provides inmate calling services. *Id.* ¶ 30.

226, Section 276 or any other section of the Act that would support imposition of such a requirement. While the Commission has authority under Section 201 to ensure that interstate rates and conditions are just and reasonable, that is a far cry from establishing a requirement that jails, prisons and other correctional facilities must offer and administer pre-paid calling offerings to ensure that incarcerated individuals have potentially less-costly offerings than collect calling options. As discussed above, the requirements of Section 226 applicable to call aggregators have been expressly recognized to be inapplicable to inmate calling systems, and the requirements for fair compensation under Section 276(b)(1)(a) flow to the *carrier*, and do not establish rights for the end user, in this case the inmates or the parties they call.[31] The Petitioners cannot demonstrate that any more general section of the Act provides the Commission with sufficient authority to require that all correctional facilities offer pre-paid debit offerings, even if their were no countervailing concerns about the merits of adopting such a requirement.

And there are substantial countervailing concerns about the merits of an FCC-mandated pre-paid debit calling option at all prisons and jails. Legitimate penological interests are implicated by the adoption of a debit calling mandate, as the Commissioner of the New Jersey Department of Corrections recently advised the FCC. Addressing the contentions regarding the questions of security and cost posed by the Petitioners' proposal, the Commissioner stated:

> In New Jersey corrections, collect calling is the only feasible means of providing inmate phone service. It is the only technology approach that allows the level of security needed to ensure that inmates are not

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[30] *Id.* ¶ 33.

[31] *See Supra* at 9-10 & n.9.

> conducting illegal businesses, are not able to bypass blocked numbers, are not making harassing calls, and are not using the telephone for purposes other than legitimate interpersonal contact. New Jersey authorities have long experienced these situations in state correctional facilities, and they cannot be tolerated on an ongoing basis. Collect calling allows the called party to accept or deny the call with the full knowledge that the caller is an inmate incarcerated at a New Jersey correctional facility.[32]

The New Jersey Department of Corrections Commissioner's view is confirmed by Bohacek and Kickler in their Joint Declaration attached to these Comments, where they state that collect calling has proven to be the most secure system for inmate use.[33]

Moreover, as Bohacek and Kickler also make clear, the adoption of a federal regulation or policy that mandates that all facilities make available a debit calling option to inmates inherently imposes significant additional administrative costs and burdens on the correctional facilities and telephone operators.[34] Dawson maintains that the only real differences between the collect calling option and the pre-paid debit option are who pays for the call and how the payment is made.[35] These differences, amongst others minimized and ignored by Dawson, are sufficiently material to validate the Commission's prior conclusions for refusing to intervene in the judgment of correctional institutions in providing inmate calling services to those incarcerated in their facilities. As Bohacek and Kickler maintain in their Joint Declaration, the administrative cost for implementing a debit system is high, and some state and local correctional facilities cannot bear its burden.[36] For example, Peter V. Macchi, the Director of Administrative Services for the Massachusetts Department of Correction, has commented in this

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[32] Letter to Marlene H. Dortch from Devon Brown, Commissioner, New Jersey Department of Corrections, CC Docket No. 96-128, filed February 6, 2004.

[33] Joint Declaration of Peter K. Bohacek, Ph.D., and Charles J. Kickler, Jr., ¶ 21.

[34] *Id.* ¶ 22.

[35] *Id.* ¶ 32.

proceeding that while the Department would "very much like to migrate" to a system where the inmate could choose to make a debit call, they are unable to do so at the present time because debit calling "is more staff intensive on resources. . . and the resources just are not available to assume this extra work."[37]

As Dawson tacitly acknowledges, the requirement to offer a pre-paid debit system will require the implementation, integration and management of a sophisticated automated processing system. Any facility that relies on operator-assisted calling will need to make major investments in hardware and software to offer a pre-paid debit calling option. Even for automated inmate calling systems, the software that must ensure compliance with all requirements for call restricting, call monitoring, call recording and other calling security functions would not be replaced, but instead would need to be supplemented by, and integrated with, a debit monitoring function. Thus, the adoption of a requirement for pre-paid debit call processing could add significant new capital costs to the operations of all corrections facilities, or the carriers with which they contract.[38]

The correctional authorities also would need to set up an extensive accounting process, which would, in part, manage individual inmate accounts. This accounting process would need to include methods for receiving and depositing funds, controlling and reviewing accounts, handling complaints from inmates and their benefactors who deposited the funds, and resolving disputes about the appropriate use of deposited funds. Moreover, in many state and

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[36] *Id.* ¶¶ 21-22.

[37] Comments of Peter V. Macchi, Director of Administrative Services, Massachusetts Department of Correction, CC Docket No. 96-128, filed February 11, 2004.

local facilities where turnover in inmates is high, the process for opening and closing debit accounts, and refunding balances on account, could be extremely cumbersome and expensive. The record in this proceeding already reflects the testimony of the Commissioner of the Connecticut Department of Corrections, who has testified against the use of debit accounts because of, among other things, the added administrative costs of the pre-paid debit calling option.[39] The Commissioner's concerns were substantiated by citation to experience with debit calling in Colorado, where ten additional full-time staff were required to manage debit accounts.[40] These costs could be exacerbated to the extent that the process for completing long distance calls varies from the manner in which local and intrastate calls are completed. Ultimately, mandating the availability of debit cards could supply upward pressure on costs and rates, especially where collect calling options will need to coexist.

When coupled with the prospect of providing multiple interexchange carriers, the billing and administrative challenges posed by the debit calling process become a nightmare. As discussed by Bohacek and Kickler, each carrier must develop and integrate software that will work with each prison debit system.[41] This development and integration will impose additional administrative burdens and costs of implementing and maintaining the debit calling system, and provide the potential for intentional or inadvertent abuse of the system, including the potential for end-runs around the security measures imposed for inmate calling services.

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[38] Joint Bohacek and Kickler Declaration, ¶¶ 21-27.

[39] *See* Comments of WorldCom, Inc., CC Docket No. 96-128, May 24, 2002, at 12, citing Testimony of John J. Armstrong, Commissioner of Department of Correction, Finance Revenue and Bonding Committee Hearing, March 14, 2002.

[40] *Id.*

Most importantly, the Commission's adoption of a requirement that private correctional facilities make available to inmates a debit calling option will substitute the FCC's judgment for that of the correctional facility regarding the harms of creating a commodity that can be the subject of threats, violence or other forms of coercion within the inmate population. If the debit system were to be administered by the prison, it would have to be incorporated not only into the telephone system and software used to protect law enforcement interests and the public, but into the every day life of inmates. The personnel at jails, prisons, detention centers and other correctional facilities will be forced to ensure that it adopts policies and procedures to deal with coercion, or suffer the consequences. There are sound penological reasons for refusing to allow inmates to possess money, cigarettes and other items that can be stolen, bartered or extorted, and the FCC should not mandate the creation of a similar commodity.

The Petitioners' efforts to minimize the problem of creating a pre-paid debit commodity fall far short of supporting the substitution of their judgment for the judgment of prison authorities on this issue. While Dawson suggests that corrections facilities can limit who can put money into prisoners' accounts,[42] once the funds are available in the accounts, they are a still a commodity that can be the subject of coercion. Dawson suggests that software programs can be developed and maintained that will restrict the use of pre-paid debit funds to calls to particular numbers, presumably authorized by those depositing funds in the pre-paid accounts, but such programming is extremely cumbersome and expensive. Even if such software programming controls were available and effective, coercive pressure could still be applied by

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[41] Joint Bohacek and Kickler Declaration, ¶¶ 24-27.

[42] Dawson Statement, ¶ 37.

aggressive inmates to attempt to ensure that the funds of their fellow inmates are authorized to work for numbers that they want to call.

As Dawson's testimony implies, correctional facilities have every incentive to implement debit calling without any federal mandate to the extent that the pre-paid debit process reduces costs and eliminates collection problems and does not create unacceptable security risks. With respect to federal prisons, the Federal Bureau of Prisons (the "BOP") has developed its own system, and implemented that system across a large population of users who are incarcerated in federal correctional facilities. Additionally, the BOP has satisfied itself that its security concerns can be managed consistently across the network architecture it has implemented throughout its facilities that is carried exclusively on the Federal Telephone System ("FTS").[43] Given the incentive to minimize uncollectible accounts Dawson recognizes in his Statement, the Commission should not impose its own judgment regarding the security risks to be taken or the administrative costs to be incurred, but should allow the states and the managers of their correctional facilities to make their own judgments based on their own economic and security concerns, and implement pre-paid debit processes only if they deem it advisable.

## V. The Commission Should Not Mandate That Correctional Facilities Adopt A Prison Telephone System With Access To Multiple Carriers.

In addition to seeking FCC-mandated pre-paid debit offerings for inmates of state and local corrections facilities, the Petitioners request that the FCC prohibit "exclusive inmate calling service agreements," and ask the FCC to void any provisions in existing contracts that provide for such exclusivity. The Petitioners apparently recognize that correctional facilities cannot be required to maintain duplicative telephone systems operated by multiple carriers

within their facilities, but extol the benefits of competition, and ask the Commission to compel the establishment of a regulated "prison telephone system" provider in each correctional facility. Each "prison telephone system" provider would be required to establish a network that complies with the Petitioners' recommended technical architecture, which the Petitioners presume would meet any "legitimate" security and anti-fraud concerns of the state and local governments; this network architecture includes as an essential feature access to choice of service from a "reasonable" number of multiple interexchange carriers. Finally, based on Petitioners' review of public filings by telephone service providers to prisons with the Securities and Exchange Commission, a summary review of just three CCA facilities, and comments in this extremely broad docket, the Petitioners request that the FCC establish a specific rate cap of seven cents per minute to be paid to the "prison telephone system."

While the Commission generally seeks to foster competition, it has recognized that some environments present particular interests that outweigh the desire to compel the provision of service from multiple carriers. As discussed above, existing rules and policies of the Commission have long recognized that these types of interests are present in the context of prisons: the legitimate interests of state and local law enforcement and correctional facilities in establishing their own balance between providing inmate calling services and ensuring that the security and anti-fraud requirements of the state are met. Indeed, the Commission has expressly refused to provide inmates with access to the carrier of this choice.[44] The Petitioners' proposal does not alter this conclusion, especially where, pursuant to the proposal to permit access to

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[43] *See* Joint Bohacek & Kickler Declaration, ¶¶ 23-24.

[44] *See Supra* at 8-9 nn. 9-10.